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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DOCTOR'S ASSOCIATES, INC. and NICK LOMBARDI,
Petitioners,

v.

PAUL CASAROTTO and PAMELA CASAROTTO,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Montana

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. THE MONTANA NOTICE STATUTE IS PREEMPTED BY THE FEDERAL ARBITRATION ACT.

Respondents do not dispute either of the two points that are essential to answering the question presented by the petition. One, the parties entered into a written agreement to arbitrate involving interstate commerce that met all of the requirements of Section 2 of the Federal Arbitration Act ("FAA"), which makes written agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Two, the Montana Supreme Court refused to enforce the agreement to arbitrate on the ground that the agreement did not comply with a notice requirement under Montana law that is applicable only to arbitration agreements and not to other types of agreements. Under the plain and un-

equivocal language of Section 2 and the decisions of this Court, those two points alone are sufficient to find preemption of the Montana notice statute. *See* Pet. 10-14.

Respondents also make no effort to justify the Montana Supreme Court's decision on the basis of the rationale relied upon by that court. Instead, respondents' brief in opposition makes just one argument why the Montana notice statute is not preempted by Section 2. According to respondents, the parties "expressly agreed to apply state law" to their franchise agreement. Br. in Opp. 6. Therefore, according to respondents, the Montana Supreme Court's decision not to enforce the agreement to arbitrate on the basis of Montana law was appropriate under *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), because the decision below was based on "a state court's interpretation of state law when "parties [have] agree[d] to apply state law." Br. in Opp. 6-7.

There are, however, several obvious problems with respondents' argument. First, the parties did not agree to apply just any "state law" to their agreement; the choice-of-law clause in the franchise agreement expressly provided that the agreement "shall be governed by and construed in accordance with the laws of the State of Connecticut." Pet. App. 5a. Respondents do not dispute that Connecticut law has no notice requirement comparable to Montana's. Thus, it is undisputed that the parties' agreement to arbitrate is enforceable under the state law chosen by the parties. *See* Conn. Gen. Stat. § 52-408 (1995).

Second, the Montana Supreme Court did not base its decision on a finding that the parties *intended* to apply Montana law to their agreement; nor could it have done so given the parties' unambiguous choice of Connecticut law. Instead, the Montana Supreme Court refused to apply the law chosen by the parties, because to do so "would be contrary to a fundamental policy of this State

by eliminating the requirement that notice be provided when a contract is subject to arbitration." Pet. App. 8a-9a.[1]

Third, therefore, respondents' reliance on *Volt* simply does not hold up. Unlike the situation in *Volt* where the state court applied the law chosen by the parties in their contract, the court in this case did just the opposite: it *refused* to enforce the state law that the parties had selected in their contract. Indeed, the court below very clearly distinguished this case from *Volt* by stating as follows: "While the Court in *Volt* applied state laws that had been chosen by the parties in their contract, . . . this case involves state law which is applied pursuant to conflict of law principles . . . ." Pet. App. 15a. Because the parties here did not choose Montana law, it can hardly be said that applying Montana law to invalidate the parties' agreement to arbitrate enforces the intent of the parties, which was the rationale for the decision in *Volt*. *See Volt*, 489 U.S. at 478; *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1216 (1995). And, because respondents' argument begins and ends with the decidedly false assumption that the parties here in-

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[1] Although respondents say that "[p]etitioners do not challenge the Montana court's application of standard conflict-of-law principles to hold that Montana law applied," Br. in Opp. 4, that representation is incorrect. As we pointed out in the petition, the Montana Supreme Court "ma[d]e a second, related error," Pet. 12 n.8, by relying on a state policy hostile to arbitration as the reason for applying Montana law to the agreement under conflict-of-law principles and then proceeding to invalidate the agreement under that same policy. If it were not for the notice requirement that petitioners argue is preempted by Section 2, the court below would not have reached its conclusion that the Connecticut law chosen by the parties was offensive to Montana's public policy. *See* Pet. App. 9a-10a. In any event, because the Montana statute is preempted by Section 2, it is not necessary for the Court to reach out and decide whether Montana's conflict-of-laws analysis was independently flawed by its dependence on a statute evidencing hostility toward arbitration.

tended the Montana notice statute to govern their relationship—an assumption not even indulged in by the Montana Supreme Court—they are left with no defense of the decision below.

What the Montana Supreme Court did decide is that Montana law, even when *not* chosen by the parties (and, more particularly, even when the parties had chosen a different state's law), could invalidate an agreement to arbitrate despite the fact that the Montana law was arbitration-specific and did not govern contracts generally. The sole basis of that decision was a misreading of *Volt* that the preemptive scope of Section 2 is limited to laws that "undermine the goals and policies of the FAA" and that the notice statute does not fall within that category. Pet. App. 15a. That misreading of *Volt* has already been thoroughly addressed in the petition,[2] and respondents have said nothing to question petitioners' analysis that state laws conditioning enforcement of arbitration agreements on compliance with particular state requirements are preempted unless they apply to contract provisions generally, and not just to arbitration provisions. *See Terminix*, 115 S. Ct. at 838-39, 843; *Perry v. Thomas*, 482 U.S. 483, 489-91 & 492 n.9 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 10-16 (1984); *Moses H. Cone*

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[2] Briefly, *Volt* did not address whether an arbitration agreement should be enforced; it dealt only with whether a state law governing the timing of arbitration could be enforced by a state court when the parties had chosen that law to govern their agreement, and where the state law fostered the federal policy favoring arbitration by addressing a practical problem that the FAA failed to address. *See* 489 U.S. at 476 n.5, 478. It is still the case that Section 2 preempts state laws that place arbitration agreements on an unequal footing with other contracts, as such laws are "*directly* contrary to the Act's language and Congress's intent." *Allied-Bruce Terminix Companies v. Dobson*, 115 S. Ct. 834, 843 (1995) (emphasis added). Respondents do not take issue with petitioners' analysis of the Montana notice statute as placing arbitration agreements on a different footing from other contracts.

Memorial Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24 (1983).[3]

II. THIS CASE IS APPROPRIATE FOR REVIEW.

Respondents attempt to minimize the conflict between the decision below and the decisions of the U.S. Courts of Appeals for the First, Second and Eighth Circuits and the Missouri Supreme Court. They do so principally on the ground that the parties here "agreed to be governed by state law" but that the parties in the cases cited by petitioners did not so agree. *See* Br. in Opp. 7-10. Because, as we have discussed, the parties did *not* agree to be bound by the Montana notice statute relied on by the court below, respondents' effort to distinguish the contrary authority falls of its own weight. Moreover, as explained in the petition, both the Second and First Circuits found preemption of notice provisions *after Volt*, with the latter expressly distinguishing *Volt* in finding preemption under Section 2. *See David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 249-50 (2d Cir.), *cert. dismissed*, 501 U.S. 1267 (1991); *Securi-*

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[3] Under the recent decision in *Mastrobuono*, Montana's notice statute would be preempted even if, hypothetically, the parties *had* agreed to let Montana law govern their franchise agreement. In *Mastrobuono*, the Court characterized a choice-of-law provision similar to the one here as merely serving as "a substitute for the conflict-of-laws analysis that otherwise would determine what law to apply to disputes arising out of the contractual relationship." 115 S. Ct. at 1217. The Court found "untenable" an interpretation of the choice-of-law clause that would put the clause in conflict with the contract's arbitration clause. *Id.* at 1219. It would be even more absurd, and in conflict with the federal policy favoring arbitration and construing ambiguities in favor of arbitration (*see id.* at 1218 & n.8), to rule on the basis of a choice-of-law clause that the parties agreed to an arbitration clause in their franchise agreement at the same time as they agreed that the arbitration clause was invalid for failure to include the prescribed notice on the first page of the agreement. Certainly, *Volt* does not dictate such a bizarre result.

ties Indus. Ass'n v. Connolly, 883 F.2d 1114, 1119 n.3 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990).

Thus, the conflict between the courts below is real and substantial. Moreover, the issue is of considerable importance. If the decision of the Montana Supreme Court is allowed to stand, other jurisdictions hostile to arbitration may feel free to follow Montana's erroneous interpretation and application of *Volt* and refuse to enforce arbitration agreements on the basis of state-law requirements that are not applicable to contracts generally. Such a result would inevitably disrupt the national uniformity that Congress sought to achieve in enacting the FAA.[4]

Respondents further contend that review by this Court is unnecessary because the Montana Supreme Court has not demonstrated "consistent hostility" toward arbitration. Br. in Opp. 12. While respondents are careful not to describe the decision below as lacking hostility toward arbitration, it is ultimately the case that this Court does not sit in review of a lower court's attitudes. Respondents' contention is therefore irrelevant to the decision whether to grant the petition. The real issue here is the notice statute. According to the court below, the notice statute embodies Montana public policy that is suspicious of arbitration as inconvenient, expensive and devoid of the pro-

[4] Respondents also argue that this case is an inappropriate vehicle for reaching the issue presented in the petition because petitioner Nick Lombardi was not a party to the agreement to arbitrate. Br. in Opp. 2 n.1, 11. The Montana trial court, however, ruled that the claims against Lombardi were encompassed by the arbitration agreement and that the claims against Lombardi should be stayed pending arbitration. Pet. App. 40a. The Montana Supreme Court did not reach that specific issue. *See* Pet. App. 5a. This Court can therefore decide the issue presented in the petition without concerning itself with whether the Montana trial court erred by staying the claims against Lombardi. That issue can be raised by respondents on remand if still appropriate. In any event, respondents' arguments regarding Lombardi have no bearing on the petition of Doctor's Associates, Inc.

cedural safeguards of a judicial proceeding. Pet. App. 9a-10a. The notice statute places agreements to arbitrate on a different footing from other agreements, and for that reason may not be applied to agreements to arbitrate that, like the one here, meet all of the requirements for enforceability under the FAA. *See Terminix*, 115 S. Ct. at 838.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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